THE RIGHT TO REMOVE TRADE FIXTURES ANNEXED BY ONE NOT THE OWNER OF THE FEE. — It has been recently decided in Massachusetts that the rails of a street railway company are personalty and go to a conditional vendor rather than to a subsequent mortgagee of the company's property.[1] *Lorain Steel Co.* v. *Norfolk, etc., St. Ry. Co.*, 73 N. E. Rep. 646 (Mass.). The case was distinguished from that of a steam railroad, the rails of which are held realty, upon the ground that a street railway company has no easement or other interest in the land.[2] This decision illustrates the general tendency of the courts to confuse two distinct questions; viz., whether the chattels have become fixtures, and whether they are removable. Whether they have become a part of the realty depends upon the objective intention of the party affixing, to be ascertained by examining the intimacy of their connection with the soil, the amount of damage to them or to the land which would be caused by removal, and their adaptability to the use to which the premises are devoted. The actual intention of the person annexing and his relation to the land bear only upon the question of removability.[3] Where such party has no permanent interest in the land, the right of removal would seem to rest upon an implied agreement with the landowner; for while a lessee or licensee may sever,[4] a trespasser has no such privilege.[5] Moreover this right of severance, implied from the license to occupy the land, seems incident to, and inseparable from, such right of occupation; for it must be exercised by the lessee before the end of his term,[6] and it passes to an assignee or mortgagee of the leasehold.[7]

As between a conditional vendor and a tenant, articles annexed under the agreement of sale should go to the former, not because the agreement has prevented their becoming fixtures, but because the tenant is under a contractual obligation to allow his right of removal to be exercised by the vendor. The contract is, in effect, to give security, and should therefore be specifically enforceable in equity.[8] But when the tenant assigns or mortgages his right to occupy the land, the right to sever passes to his assignee and the vendor's right is cut off at law. A court of equity, however, should enforce it against a transferee of the tenant who has notice or has not parted with value in reliance upon the presence of the fixture on the land. Thus subsequent transferees with notice and prior encumbrancers should be postponed to the conditional vendor.[9]

WRONGFUL SALE OR RE-PLEDGE BY A PLEDGEE. — Whether a pledgee who wrongfully sells or re-pledges his security, in excess of his authority, is

---

[1] Hart *v.* Benton-Bellefontaine Ry. Co., 7 Mo. App. 446, *contra.* See Readfield, etc., Co. *v.* Cyr, 95 Me. 287; American Union Telegraph Co. *v.* Middleton, 80 N. Y. 408.

[2] Hunt *v.* Bay State Iron Co., 97 Mass. 279.

[3] In the majority of jurisdictions chattels annexed by a tenant for purposes of trade are considered parts of the realty, though removable by the tenant. *Cf.* Gibson *v.* Hammersmith Ry. Co., 32 L. J. Ch. 337; Bliss *v.* Whitney, 9 Allen (Mass.) 114.

[4] Gibson *v.* Hammersmith Ry. Co., *supra;* Bliss *v.* Whitney, *supra.* See Barnes *v.* Barnes, 6 Vt. 388, 394.

[5] Van Size *v.* Long Island R. R. Co., 3 Hun (N. Y.) 613.

[6] *Cf.* Watriss *v.* First National Bank of Cambridge, 124 Mass. 571.

[7] *Ex parte* Astbury, L. R. 4 Ch. 630.

[8] See Hermann *v.* Hodges, L. R. 16 Eq. 18.

[9] *Cf.* Davenport *v.* Shants, 43 Vt. 546; Brennan *v.* Whitaker, 15 Oh. St. 446. *Contra,* Ford *v.* Cobb, 20 N. Y. 344; Clary *v.* Owen, 15 Gray (Mass.) 522.

liable to his pledgor in trover without a tender of the debt, is a question on which the authorities are in conflict. The first adjudication of the point in England held him liable, but limited the plaintiff's recovery to the amount of his actual loss.[1] The case was, however, virtually overruled by two later decisions,[2] and the law is now settled in England that the pledgor's right to possession of the pledge is always conditioned on tender of the debt. A recent Canadian case has approved the English view. *Ames* v. *Sutherland*, 5 Ont. W. Rep. 328. In this country the courts are still in conflict.[3] The English rule is difficult to defend. It is well settled that a mere lien-holder, as a bailee for hire, is immediately liable in trover for wrongfully parting with the bailed property.[4] By parting with it he loses his lien, and the bailor thus acquires an immediate right of possession. The only reason assigned for a different holding in the case of a pledgee is that his rights are larger than those of a lien-holder: on compliance with certain conditions he has a right to sell or re-pledge; therefore, it is argued, an improper sale or re-pledge does not altogether divest him of his right of possession as against the pledgor. The question of the amplitude of his powers seems, however, quite beside the mark; whatever they may be, if he exceeds them, he should be held as strictly to account as a bailee for hire.

If, however, he is liable in trover, must he pay full damages? The English case which holds that he need not, apparently places his right to reduce the damages on principles of recoupment;[1] and some American cases have expressly put it on this ground.[5] This view, however, seems questionable. The common law right to reduce damages in recoupment exists only where the defendant has suffered loss by the plaintiff's breach of an obligation arising from the same contract,[6] and the right would thus seem hardly broad enough to include the case under discussion.[7] Moreover, even if recoupment is allowed, it will obviously not afford the pledgee an adequate remedy where the pledge at the time of the conversion is worth less than the debt,[8] — as, for instance, where stock has been bought on margin and the margin has been wiped out. In such a case the defendant, for complete protection, would have to rely on the statutory remedies of set-off or counterclaim, which, however, in many jurisdictions in this country would probably be found liberal enough for the purpose.[9] But even if neither recoupment nor a statutory remedy is available, the result could hardly be considered unjust, since it is by his own breach of contract that the pledgee has been deprived of his security.

FORFEITURE OF INSTALMENTS BY CONDITIONAL VENDEE UPON DEFAULT. — There is considerable conflict of opinion upon the question of the conditional vendee's right to instalments already paid, when he makes default

---

[1] Johnson *v.* Stear, 15 C. B. (N. S.) 329.
[2] Donald *v.* Suckling, L. R. 1 Q. B. 585; Halliday *v.* Holgate, L. R. 3 Exch. 299.
[3] In *accord* with the English rule, Talty *v.* Freedman's Savings Bank, 93 U. S. 321. *Contra*, Neiler & Warren *v.* Kelley, 69 Pa. St. 403; Feige *v.* Bert, 118 Mich. 243.
[4] Pollock, Torts, 6th ed., 350.
[5] Neiler & Warren *v.* Kelley, *supra*.
[6] Waterman, Set-off, Recoupment and Counterclaim § 422.
[7] See Smith *v.* Hall, 67 N. Y. 48.
[8] See Batterman *v.* Paine, 3 Hill (N. Y.) 171.
[9] See Richardson *v.* Ashby, 132 Mo. 238.